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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1964

No. [redacted] 27

F. J. GUNTHER,
Petitioner,

vs.

SAN DIEGO & ARIZONA EASTERN
RAILWAY COMPANY, a corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled cause on September 4, 1964.

CITATION TO OPINION BELOW

The opinion and judgment of the Court of Appeals, printed in Appendix B hereto, is reported in 336 F.2d 543.

The opinion of the District Court denying respondent's first motion for summary judgment is reported in 192 F.Supp. 882 (S.D. Cal. 1961), and the opinion granting respondent's second motion for summary judgment is reported in 198 F.Supp. 402 (S.D. Cal. 1961).

JURISDICTION

The judgment of the Court of Appeals was entered on September 4, 1964. The jurisdiction of this Court is invoked under 28 U.S.C., section 1254 (1).

QUESTION PRESENTED

In this action under 45 U.S.C., section 153 (p), to enforce an Award and Order of the National Railroad Adjustment Board, the District Court, on motion of respondent for summary judgment, determined that the applicable collective bargaining agreement did not limit respondent's "residual right" (*Gunther v. San Diego & Arizona Eastern Ry. Co.* (S.D. Cal. 1961), 198 F.Supp. 402, 414), to determine the physical fitness of its employees. It therefore concluded that the Board had exceeded its jurisdiction when it established a three-physician panel to determine petitioner's physical fitness to continue in active service as a locomotive engineer and in ordering petitioner reinstated to such service, with back pay, on the basis of the findings of said panel. Since the Board's Award and Order were *ultra vires,* the District Court

deemed itself without jurisdiction to hear the merits of the petition.

The question presented is whether this summary rejection of petitioner's suit, based on said Award and Order, is consistent with the presumptive validity conferred upon such awards by Section 3 (p) of the Railway Labor Act (45 U.S.C., section 153 (p)), the comprehensive statutory scheme for amicable adjustment of disputes between carriers by rail and their employees, and the decisions of this Court which require railroad workers, in seeking implementation of their contractual rights to continued employment, to abstain from concerted economic action and to place their entire reliance on the Board and, if its award is favorable, the federal judiciary.

STATUTES INVOLVED

The statutory provisions involved are Sections 1-6 of the Railway Labor Act, 45 U.S.C., Sections 151-156. Pertinent provisions of Section 3 (45 U.S.C., section 153) are printed in Appendix A hereto.

STATEMENT OF THE CASE

Petitioner is aware of the importance of brevity of this statement. However, this case has a lengthy history. It was referred to as an "endless proceeding" by the Court of Appeals for the Fifth Circuit in

Hodges v. Atlantic Coast R. Co. (5th Cir. 1962), 310 F.2d 438, 444. The saga of petitioner's long struggle to vindicate his right to continue in active service, and to back pay, is published in three District Court opinions (*Gunther v. San Diego & Arizona Eastern Ry. Co.* (S.D. Cal. 1958), 161 F.Supp. 295; *Gunther v. San Diego & Arizona Eastern Ry. Co.* (S.D. Cal. 1961), 192 F.Supp. 882; *Gunther v. San Diego & Arizona Eastern Ry. Co.* (S.D. Cal. 1961), 198 F. Supp. 402), and one opinion of the Court of Appeals (*Gunther v. San Diego & Arizona Eastern Ry. Co.* (9th Cir. 1964), 336 F.2d 543).

Demonstration of the error below (failure to recognize the presence of factual issues for trial) and of the inconsistency between the decision of the Court of Appeals and that of the Third Circuit in *Kirby v. Pennsylvania R. Co.* (1951), 188 F.2d 793, and that of the Fifth Circuit in *Hodges, supra,* and of the violence which the decision below does to the legislative scheme for orderly adjustment of employer-employee disputes in the rail industry, as elaborated by decisions of this Court, requires petitioner to present said history in some detail. Petitioner will endeavor to be as brief as adherence to these considerations will permit.

On December 30, 1954, respondent, a wholly owned subsidiary of the Southern Pacific Company and a railroad carrier operating a freight service over track running between San Diego, California, and El Centro, California, removed petitioner from active service on the basis of a report by its chief surgeon that his

heart was in such condition that he would be likely to suffer an acute coronary episode. (R 70-71)[1]

Petitioner had been employed by respondent since 1916—as a fireman until 1923 and thereafter as a locomotive engineer. (R 2-3, 56-57) For many years during this long service, and continuing to the date of such removal, petitioner was General Chairman for the Brotherhood of Locomotive Firemen and Enginemen.[2] (R 99) The designated collective bargaining agent for respondent's engineer employees during this period, however, was a rival organization, the Brotherhood of Locomotive Engineers.[3] Thus, despite petitioner's membership and official status with the BofLF&E, the terms of his employment were to be found in the agreement between respondent and BofLE.[4]

For many years prior to December 30, 1954, the officials of the BofLE and respondent carried on continuing negotiations with respect to demanded changes in the terms of the agreement and with respect to disputes arising out of claims of individual employees, or groups of employees, based upon alleged violations of contractual rights, i.e., grievances. Negotiations upon proposed changes were initiated by the notice required by Section 6 of the Railway Labor Act. (45 U.S.C., section 156) Grievances were handled by the

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[1]The record on appeal is a Clerk's Transcript of the file of the District Court. It has not been printed. It will be referred to herein by the designation "R" with appropriate page number.

[2]Hereinafter referred to as "BofFL&E."

[3]Hereinafter referred to as "BofLE."

[4]Hereinafter referred to as "SD&AE-BofLE agreement."

conference procedure provided by Section 2, "General Duties, Second," of said Act. (45 U.S.C., section 152 (Second))

Both types of negotiations could and did culminate in the creation of new contractual rights and duties. Such rights and duties arising as a result of adjustment of individual claims were referred to as "interpretations," and were evidenced by confirmatory correspondence contained in respondent's files and those of the General Committee of Adjustment, BofLE, in San Francisco, California. (Affidavit of J. P. Colyar and Exhibits A through O thereto, R. 187, 193-218)[5]

(Over the years in question the negotiating process between the San Diego & Arizona Eastern Railway and the BofLE was between the BofLE General Chairman, whose office was in San Francisco, and respondent's General Manager in Los Angeles. Conferences were held in Los Angeles. The same BofLE General Chairman negotiated with officials of the parent Southern Pacific Company's personnel department in San Francisco for agreement covering engineers employed on that company's Pacific Lines.)

At rare intervals the contracting parties would arrange for publication of a printed booklet purporting to be the "Agreement." On December 30, 1954, the most recently published booklet bore the date of November 30, *1938*. There appeared in this printed booklet no provision for compulsory retirement.

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[5]Mr. Colyar has been BofLE General Chairman in San Francisco since 1947.

Article 35 thereof conferred seniority rights upon engineer employees by means of the following language:

> "Rights of engineers shall be governed by seniority in service of the Company as engineers and seniority of the engineer as herein defined shall date from first service as engineer.
>
> * * *
>
> "Where there is a surplus of engineers for the business of the district, the oldest engineer in point of seniority shall have the preference for employment."

Article 47 of the printed booklet of November 30, 1938, established the principle of continued employment, in the absence of good cause for termination, or suspension, thereof as follows:

> "No engineer shall be suspended or discharged, except in serious cases, where fault is apparent beyond a reasonable doubt, until he has had a fair and impartial hearing before the proper officials."

On December 30, 1954, the date of petitioner's disqualification, there resided in the files of respondent and the BofLE in San Francisco a series of letters evidencing agreement, effective January 1, 1945, to add to Article 9, Section 1(c) of the SD&AE-BofLE agreement, a provision identical to the then existing Article 12, Section 1(c) of the agreement between the Southern Pacific Company (Pacific Lines) and BofLE,[6] as follows:

> "Engineers assigned to regular runs, who through no fault of their own are not used

[6]Hereinafter referred to as "SP-BofLE agreement."

thereon and their runs are worked in whole or in part, will be allowed the full mileage of their assignments."

Additionally, said letters evidenced agreement from that date forward "to applying interpretations made on articles in Pacific Lines Engineers' Agreement [SP-BofLE agreement] that are similarly worded in SD&AE Engineers' Agreement to SD&AE Engineers' Agreement." (Exhibit H, Affidavit of J. P. Colyar, R 204-206)

At said time there also resided in said files a series of letters pertaining to the grievance of an engineer employee on the Southern Pacific Company who had been deprived of his regular run by reason of company-claimed physical disability. (Exhibits K and L, Affidavit of J. P. Colyar, R. 209-213) The claim was adjusted amicably in conference and, as evidenced by letter of November 13, 1947, led to agreement between the Southern Pacific Company and BofLE on the general problem of disputes as to physical fitness and consequent claimed loss of "regular run . . . through no fault of their own" by engineers held out of service upon a claim of physical unfitness. This agreement was memorialized in said letter of November 13, 1947, as follows:

> "We further advised you, with the understanding that it is the company's responsibility to prescribe physical standards required of employees to qualify them for service and to remain in service, that we were agreeable in any case where an engineer was removed from his position on account of his physical condition and he desires

> the question of his physical ability to conform to prescribed physical standards to be determined, the management was agreeable to setting up a special panel of doctors consisting of one doctor selected by the company, one doctor selected by the employee or his representative, the two doctors thus selected to confer and appoint a third doctor specializing in the disease, condition or physical ailment from which the employee is alleged to be suffering. The management and the engineer will each defray the expenses of their respective appointee, and will each pay one-half of the fee and traveling expenses of the third appointee. This panel of doctors upon completing their examination will make a full report in duplicate, one copy each to be sent to the general manager and the engineer. At the time of making the report a bill for the fee and traveling expenses, if there be any, of the third appointee shall be made in duplicate, one copy to be sent to the general manager and one copy to the engineer." (Exhibit L to Affidavit of J. P. Colyar, R 211-213)

According to the affidavit of J. P. Colyar, General Chairman of the BofLE, which petitioner submitted to the District Court in support of his motion to be relieved from the operation of summary judgment, this was an *interpretation* placed on Article 12, Section 1(c) of the SP-BofLE agreement, and, since Article 9, Section 1(c) of the SD&AE-BofLE agreement was not just similarly, but identically, worded, it constituted an *interpretation* to be placed on Article 9, Section 1(c) of the SD&AE-BofLE agreement pur-

suant to the previous agreement of January 1, 1945. The affidavit stated, in part:

> "By reason of the foregoing, since November 13, 1947 and to and including December 30, 1954, the date Mr. F. J. Gunther was removed from service by the San Diego & Arizona Eastern Railway Company, the SD&AE-BofLE agreement contained a provision whereby, in the event a SD&AE engineer was removed from service on account of his physical condition by the company and the engineer desired the question of his physical ability to conform to prescribed physical standards to be further investigated and determined, a special panel of physicians consisting of one doctor selected by the company, one doctor selected by the employee, and a third doctor selected by the two so appointed, was to examine the employee and the report of such panel accepted as determinative of the employee's physical fitness to continue in service." (R 191)

According to the affidavits of petitioner and his counsel, submitted in support of said motion, neither was aware of the existence of the above described correspondence, and the agreement thereby evidenced, until approximately four months following grant of respondent's second motion for summary judgment in the second Gunther case.

Upon his physical disqualification on December 30, 1954, petitioner, alleging absence of physical infirmity and supporting same with the written report of W. C. Hall, M.D., a San Diego specialist in internal medicine, sought relief from the First Division of the National Railroad Adjustment Board. This claim, by

Award 17 161 of October 6, 1955, was denied without prejudice on the ground that Dr. Hall had not expressed the opinion that he deemed petitioner physically qualified to perform the duties required of an engineer.

Petitioner promptly obtained a supplemental report from Dr. Hall in which he stated that he knew of no such work which petitioner was not capable of performing. On resubmission of the claim, and deadlock by the carrier and labor members of the Board, the case was referred for decision by a referee appointed by the National Mediation Board. (See 45 U.S.C., section 153(l)) The referee, finding a good faith dispute of opinion between respondent's chief surgeon and Dr. Hall, asserted the power and propriety of establishment by the Board of a three-physician panel to examine petitioner, and phrased the Board's Finding in support of its Award 17 646[7] as follows:

> "If the decision of the majority of such Board shall support the decision of carrier's chief surgeon the claim will be denied; if not, it will be sustained with back pay pursuant to rule on the property from October 15, 1955, the date of the letter of Dr. Hall showing disagreement with the findings of disqualification by the company physician." (R 8)

The parties complied with the award, and a neutral physician, John H. Schlappi, M.D., was selected. He examined petitioner and reported:

> "It is my opinion at the present time he has no physical defects which should prevent him from

[7]Award 17 646 of October 2, 1956, is Appendix D hereto.

carrying on his usual occupation. I will not comment on the question as to whether a man of seventy-two, no matter what his physical condition, should be employed as an engineer because that is a matter of general policy and experience of the railroad."

At this point respondent's compliance with Award 17 646 ended. Reinstatement of petitioner was refused.

Petitioner then filed, pursuant to the authorization of 45 U.S.C., section 153(p), his petition to the District Court to enforce said Award. This initiated *Gunther I*. On respondent's motion for summary judgment, the District Court found Award 17 646 to be without sufficient finality to support an enforcement action and dismissed the petition on the authority of *Smith v. Louisville & Nashville R.R.* (S.D. Ala. 1953) 112 F.Supp. 388. (*Gunther v. San Diego & Arizona Eastern Ry.* (S.D. Cal. 1958) 161 F.Supp. 295)

The Fifth Circuit rejected the rationale of *Smith* and *Gunther I* in *Hodges v. Atlantic Coast R.R. Co.* (5th Cir. 1962), *supra*, 310 F.2d 438.

Prior to such judgment of dismissal petitioner resubmitted his claim to the First Division of the National Railroad Adjustment Board, this time supplementing same with the report of Dr. Schlappi. Again the carrier representatives and the labor representatives were equally divided, and a referee was appointed by the National Mediation Board. The result was an Interpretation[8] (45 U.S.C., section 153(m)) of

[8]The Interpretation and Award of October 8, 1958, is Appendix E.

Award 17 646, which concluded as follows:

> "The issue of fact upon which the prior Award 17 646 was conditioned having been determined in favor of claimant, said conditional award should be made absolute and final and the claim sustained as therein provided.
>
> "AWARD: Claim sustained for reinstatement with pay for all time lost from October 15, 1955 pursuant to rule on the property."

This Award was dated October 8, 1958. Petitioner's attempts to obtain voluntary submission by respondent to the Board's mandate were unavailing. Concerted economic action to enforce same was contraindicated by the decision of this Court in *Brotherhood of R. Trainmen v. Chicago River & Indiana R. Co.* (1957) 353 U.S. 30, 77 S.Ct. 635. Petitioner's prescience in this regard was confirmed by the subsequent decision of this Court in *Brotherhood of Loc. Eng. v. Louisville & N. R.R. Co.* (1963) 373 U.S. 33, 83 S.Ct. 1059.

Thus, on September 26, 1960, within the two-year limitation period of 45 U.S.C., section 153(q), petitioner filed again with the District Court a petition seeking the court's assistance in implementation of the Board's award. This initiated *Gunther II*.

On the first motion for summary judgment interposed by respondent, the District Court rejected the assertion of the statute of limitations and the doctrine of res judicata as barring the claim. However, insofar as the motion was based upon the ground that, in establishing the three-physician panel and relying upon

its findings to support its award the Board had exceeded its jurisdiction, the court denied the motion without prejudice to its renewal. (*Gunther v. San Diego & Arizona Eastern Ry.* (S.D. Cal. 1961) 192 F.Supp. 882)

Respondent then moved for summary judgment a second time, renewing its claim that the award and order sought to be enforced was *ultra vires* and, hence, unenforceable.

It was the substance of respondent's affidavits submitted in support of the motion that the 1938 booklet was the entire collective bargaining agreement in effect on December 30, 1954, and that it contained no provision limiting respondent's right to determine the physical qualifications of its employees.

Petitioner filed an affidavit in opposition, asserting the booklet language providing for continuing employment in the absence of good cause for dismissal or discipline and for preferential employment based upon seniority. Said affidavit asserted the ambiguity, requiring extrinsic evidence for its clarification, created by the existence of this language and the absence of any provision for protecting the employee against loss of such rights upon resort by respondent to the simple expedient of ex-parte physical disqualification.

Petitioner further asserted, by said affidavit, that contractual limitation upon respondent's right to determine the physical fitness of its engineer employees existed by virtue of the language conferring right to continued employment in the absence of good cause for termination or suspension and the right to prefer-

ence based on seniority, and the custom and practice of the parties to the agreement in the day-to-day interpretation and application thereof in adjusting disputes as to the physical fitness of engineer employees to perform their assigned tasks. Petitioner thus posed an issue of fact for trial, to wit, whether the agreement, as interpreted with the aid of evidence extrinsic to said printed booklet, provided for implementation of the right to continued employment in the absence of good cause to suspend or terminate same, and the right of seniority, by review of respondent's ex-parte determination of physical unfitness—a provision which, if it existed, would, of course, limit respondent's "residual right" to determine the physical fitness of its employees.

Respondent's second motion for summary judgment was granted, and the petition for enforcement of the Board's order of reinstatement was thus dismissed without a hearing on the merits. (*Gunther v. San Diego & Arizona Eastern Ry. Co.* (S.D. Cal. 1961), 198 F.Supp. 402)

Following the docketing of his appeal to the Court of Appeals for the Ninth Circuit, petitioner discovered the above described documentary evidence of the existence, as of December 30, 1954, of a contractual provision for a three-physician panel to determine disputes as to physical fitness. His motion under Rule 60(b) of the Federal Rules of Civil Procedure to be relieved from the operation of the summary judgment was denied. The District Court did not deem sufficient his explanation that his failure to produce said evi-

dence on the hearing of the motion for summary judgment was due to the fact that he did not have access to the files of the rival union. It was also the view of the District Court that "petitioner has not produced and would not be able to produce at trial any evidence which could lead to a determination in his favor." (R 314)

Petitioner's appeal was perfected from both the summary judgment and the denial of his Rule 60(b) motion. The Court of Appeals affirmed the judgments below.

REASONS FOR GRANTING THE WRIT

The decisions below involve a good deal more than deprivation of a single railroad worker's right to a hearing upon the merits of his claim, as vindicated by the National Railroad Adjustment Board, to reinstatement and back pay. They constitute a stubborn refusal by the District Court and the Court of Appeals to "take the findings of these divisions of the Railroad Adjustment Board as they come and to do what they can with them." (*Kirby v. Pennsylvania R. Co.* (3d Cir. 1951) 188 F.2d 793, 796)

The Court of Appeal's determination that petitioner's request for enforcement of the Board's award of reinstatement with back pay presents no dispute "growing out of a grievance or question of contract interpretation" (Appendix B, *infra,* page ix) is, of course, in direct conflict with the Board's determination that:

"It is true that carrier has the right and responsibility of determining within proper limits the physical fitness of employees to remain in service. It is true also that the employe has the right to priority in service according to his seniority and pursuant to the agreement so long as he is physically qualified. Where these two rights come into collision it has consistently been held by this Division that it has jurisdiction to determine whether the employe has wrongfully been deprived of service." (Appendix D, *infra,* pages xviii-xix)

In asserting its precedence in the business of ascertaining what are the rights and duties of employer and employee as established by the *sui generis* method of collective bargaining in the railroad industry, the Court of Appeals has disregarded the "expertise" (*Elgin, J. & E. Ry. Co. v. Burley* (1946) 327 U.S. 661, 664, 66 S.Ct. 721) of the Board in this field of endeavor, and the prima facie value, or presumptive validity, of the work of the Board. The inconsistency, in principle, between the Court of Appeal's decision herein and the rationale underlying this Court's decision in *Elgin, supra,* and that of the Court of Appeals for the District of Columbia in *Washington Terminal Co. v. Boswell* is apparent. In *Washington Terminal* the late Justice Rutledge described the substantive effect of Adjustment Board awards as follows:

"The statute also relieves the employee of another burden. It provides that the enforcement suit 'shall proceed in all respects as other civil suits, except that on the trial . . . the findings and order of the division of the Adjustment Board

shall be prima facie evidence of the facts therein stated.' 45 U.S.C.A. § 153, First (p). The burden of proof, in making a prima facie case, may be financial as well as procedural, and it may be heavy. The statute relieves the employee of this, at least to some extent, when he introduces the findings and order in evidence. Though they may not make his case finally, they do so initially. They also bring to the court the weight of decision on facts and law by men experienced in contracts, disputes and proceedings of this special and complicated character. The whole adjustment procedure up to the point of award, findings and order by the Board, appears to be constructed upon the idea that it is not the business of lawyers, but is the business of railroad men, workers and managers alike. That does not make their findings and decisions less probative; rather it should make them more so. They know the language, functions and purposes of railroads and of their collective agreements. Their judgment is informed by experience in negotiating and administering these contracts. Because of this they, perhaps better than lawyers, are qualified to interpret and apply them. Whether so or not, their judgment should carry weight when the judicial stage of controversy is reached. It cannot be assumed, therefore, that the findings have no substantive effect, merely because they were not given finality, as to either facts or law. They are probative, not merely presumptive in value, having effect fairly comparable to that of expert testimony." (*Washington Terminal Co. v. Boswell* (D.C. Cir. 1941) 124 F.2d 235, 241, affirmed by an equally divided court, 319 U.S. 732, 63 S.Ct. 1430)

See also, *Hanson v. Chesapeake & Ohio Ry. Co.* (D.C. W. Va. 1961) 198 F.Supp. 325; *Russ v. Southern Ry. Co.* (E.D. Tenn. 1963) 218 F.Supp. 634.

The decision of the Court of Appeals herein, like those of the District Court, demonstrates judicial inability to recognize the distinctive nature of agreements resulting from the collective bargaining process. The Court has accepted the erroneous view that the booklet of November 30, 1938—the document which the District Court described as a "barebone" agreement—constitutes the only evidence as to the agreement of the parties. By asserting that from the absence of language in the booklet specifically limiting respondent's right to determine physical fitness of its employees the conclusion inevitably follows that no such limitation exists, the Court ignores the finding of the Board to the contrary and, also, the assertions of fact in petitioner's affidavit filed in opposition to the second motion for summary judgment wherein he spelled out the role of custom and practice in the interpretation and application of the agreement as an evidentiary source.

Custom and practice does provide evidence of contractual obligations and rights. In *Order of Railway Conductors v. Pitney* (1946) 326 U.S. 561, 66 S.Ct. 322, 325, this Court has noted the importance of evidence as to usage, practice and custom as follows:

> "For O.R.C.'s agreements with the railroad must be read in the light of others between the railroad and B. R. T. And since all parties seek to support their particular interpretation of these agree-

ments by evidence as to usage, practice and custom that too must be taken into account and properly understood. The factual question is intricate and technical. An agency especially competent and specifically designated to deal with it has been created by Congress. Under these circumstances the court should exercise equitable discretion to give that agency the first opportunity to pass on the issue."

If the case at bar signified only a failure by the courts below to heed the established rule prohibiting summary judgment unless the record makes it crystal clear that there are no factual issues for trial, this petition would not be filed. But, it signifies much more than that. It constitutes precedent which is in conflict, in principle, with the authorities cited above which, by giving full credit to the language of 45 U.S.C., section 153(p) of the Railway Labor Act—"The findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated"—would seem to preclude dismissal of a petition to enforce a final award of the Board on motion for summary judgment.

Additionally, the decision of the Court of Appeals conflicts, in principle, with the decision of the Third Circuit in *Kirby v. Pennsylvania R. Co.* (1951) supra, 188 F.2d 793, and the more recent decision of the Fifth Circuit in *Hodges v. Atlantic Coast R. Co.* (1962) *supra,* 310 F.2d 438.

In both of these decisions there is recognition by the Court of Appeals that the role of the federal judiciary in entertaining petitions to enforce Adjustment Board

awards is to assume a realistic approach to the work of the Board, to recognize the presumptive validity of the Board's findings as to what the collective bargaining process has established as being the contractual rights and duties of the parties, and to suppress the judicial tendency to minimize the fact finding capacities of an administrative tribunal.

Finally, the Court of Appeals decision is out of step with recent decisions of this Court which enlarge the credit to be accorded to the role of the arbitration tribunal in the disposition of claims arising out of collective bargaining agreements and profoundly limit the remedies of railroad workers who assert claims of contract violation against their employers.

There is a close analogy between the role of the Adjustment Board in determining disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions" (45 U.S.C., section 153(i), and that of an arbitration tribunal acting pursuant to a collective bargaining agreement provision like those involved in the cases commonly referred to as the Steelworkers trilogy. (*United Steelworkers of Amer. v. American Mfg. Co.* (1960) 363 U.S. 564, 80 S.Ct. 1343, *United Steelworkers of Amer. v. Warrior & Gulf N. Co.* (1960) 363 U.S. 574, 80 S.Ct. 1347, and *United Steelworkers of Amer. v. Enterprise W. & C. Corp.*, 363 U.S. 593, 80 S.Ct. 1358) These authorities stand for the general proposition that the public interest in orderly adjustment of differences between industrial employers and their employees is best served by ju-

dicial recognition of the jurisdiction of the instrumentalities established for the specific purpose of adjusting and arbitrating such differences.

Thus, in the *American Mfg. Co.* case this Court said—"The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, *or determining whether there is particular language in the written instrument which will support the claim.* (363 U.S. 564, 568, 80 S.Ct. 1343, 1346, emphasis added) And, in the *Warrior & Gulf* case there was agreement with the observation that "It is not unqualifiedly true that a collective bargaining agreement is simply a document by which the union and employees have imposed upon management limited, *express* restrictions of its otherwise absolute right to manage the enterprise, *so that an employee's claim must fail unless he can point to a specific contract provision* upon which the claim is founded. * * * Within the sphere of collective bargaining, the institutional characteristics and the governmental nature of the collective bargaining process demand a common law of the shop *which implements and furnishes the context of the agreement.*" (363 U.S. 574, 579, 580, 80 S.Ct. 1347, 1351, emphasis added)

Also in the *Warrior & Gulf* case this Court recognized that "When an absolute no-strike clause is included in the agreement, then in a very real sense everything that management does is subject to the agreement, for either management is prohibited or limited in the action it takes, or if not, it is protected

from interference by strike." (363 U.S. 574, 583, 80 S.Ct. 1347, 1353)

Prior to the decisions above discussed, this Court had held that the Norris-LaGuardia Act did not deprive District Courts of power to enjoin railroad workers from striking to obtain redress of a grievance cognizable by the Adjustment Board. (*Brotherhood of Railroad Trainmen v. Chicago River & Indiana R. Co.* (1957) 353 U.S. 30, 77 S.Ct. 635) Thus, the remedy of an aggrieved railroad worker was limited to the grievance procedure, including resort to the Adjustment Board, outlined in 45 U.S.C., section 153(i) et seq.; his resort to self help, in concert with his fellow employees, could be barred by an injunction.

And then, in *Brotherhood of Locomotive Engineers v. Louisville & N. R. Co.* (1963) 373 U.S. 33, 83 S.Ct. 1059, the *Chicago River* rule was extended to bar the remedy of such self help to require the employer to implement an Adjustment Board award in the employee's favor. Thus, insofar as claims cognizable by the Adjustment Board are concerned, the "no-strike clause" mentioned in the *Warrior & Gulf* case exists in the railroad industry by virtue of this Court's decisions. Railroad workers must rely on the Board, and not look to their own economic strength, in asserting contractual rights, and they must rely on the federal judiciary, and not their economic strength, when the employer refuses to comply with a Board award vindicating such a right.

All of this militates strongly in favor of a friendly, rather than hostile, reception to Board awards by the

federal judiciary, and demonstrates the inconsistency of the decision herein with the above discussed decisions of this Court.

CONCLUSION

For the foregoing reasons petitioner respectfully submits that this petition for a writ of certiorari should be granted.

Dated, December 2, 1964.

CLIFTON HILDEBRAND,
Attorney for Petitioner.

CHARLES W. DECKER,
Of Counsel.

(Appendices A, B, C, D and E Follow)

SEC. 3. Section 3 of the Railway Labor Act is amended to read as follows:

"NATIONAL BOARD OF ADJUSTMENTS—GRIEVANCES—INTERPRETATION OF AGREEMENTS

* * * *

"(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as 'referee,' to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this Act for the appointment of arbitrators and shall fix and pay the compensation of such referees.

"(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective

parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except in so far as they shall contain a money award. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

"(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

"(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay the employee the sum to which he is entitled under the award on or before a day named.

"(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order

of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

"(q) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after."

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Appendix B

United States Court of Appeals
For The Ninth Circuit

No. 18,724

F. J. GUNTHER,
Appellant,
vs.
SAN DIEGO & ARIZONA EASTERN RAILWAY COMPANY, a corporation,
Appellee.

[Sep. 4, 1964]

On Appeal from the United States District Court for the Southern District of California, Southern Division

Before: POPE, HAMLEY and MERRILL, Circuit Judges

MERRILL, Circuit Judge:

Appellant initiated this proceeding on November 28, 1960, by filing in the District Court for the Southern District of California a petition under 45 U.S.C. 153

(p),[1] seeking enforcement of an award and order of the First Division of the National Railroad Adjustment Board. That award and order directed that appellant be reinstated by the Railroad to active employment, with pay for lost time. The Railroad successfully contended before the District Court that the award and order was made in excess of the jurisdiction of the Adjustment Board, and was therefore not subject to a judicial order of enforcement. Summary judgment was rendered in favor of the Railroad. Appellant subsequently moved, under F.R.C.P. Rule 60(b), to be relieved of judgment on the ground of newly discovered evidence. This motion was denied by the court. Appeals from both the judgment and subsequent order were taken and have been consolidated.

On December 30, 1954, shortly after appellant's seventy-first birthday, the Railroad removed him from active service. He had been employed by the Railroad since December, 1916, and his employment since December, 1923, had been as locomotive engineer.

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[1] "If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner * * * may file in the District Court * * * a petition setting forth briefly the causes for which he claims relief, and the order of the Division of the Adjustment Board in the premises. Such suit in the District Court shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, * * *. The District Courts are empowered under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board." (45 U.S.C. 153(p) (1958).)